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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

NATIONAL LABOR RELATIONS BOARD,	**Case No.:**
Plaintiff,	**COMPLAINT FOR DECLARATORY JUDGMENT**
v.	
STATE OF OREGON,	
Defendant.	

1. Plaintiff, the National Labor Relations Board ("NLRB" or the "Agency"), seeks a declaratory judgment under 28 U.S.C. §§ 2201 and 2202 declaring that Oregon Laws 2009, chapter 659, subchapters 780 and 785, ("the Oregon statute"), attached as Exhibit 1, is invalid as to employers subject to the jurisdiction of the National Labor Relations Act ("NLRA"), as amended, 29 U.S.C. §§ 151-169, because the Oregon statute is preempted by the NLRA.

JURISDICTION AND VENUE

2. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1337. This action arises under the Supremacy Clause of the United States Constitution (Article VI, Clause 2) and the NLRA. Venue is proper under 28 U.S.C. § 1391 because a substantial part of the events giving rise to this claim occurred in this judicial district.

PARTIES

3. The NLRB is an independent agency of the United States, created by Congress in 1935 and charged with exclusive administration of the NLRA. 29 U.S.C. § 153.

4. Defendant State of Oregon is one of the fifty states of the United States.

FACTS AND CLAIMS FOR RELIEF

5. The Oregon statute, entitled "Discrimination for nonparticipation in employer-sponsored meetings about religious or political matters," was enacted in January 2010. It provides in relevant part that:

> An employer . . . may not discharge, discipline or otherwise penalize or threaten to discharge, discipline or otherwise penalize or take any adverse employment action against an employee:
>
> (a) Because the employee declines to attend or participate in an employer-sponsored meeting or communication with the employer . . . if the primary purpose of the meeting or communication is to communicate the opinion of the employer about religious or political matters;
>
> (b) As a means of requiring an employee to attend a meeting or participate in communications described in paragraph (a) . . .; or
>
> (c) Because the employee . . . makes a good faith report, orally or in writing, of a violation or suspected violation of this section.

ORS 659.785(1).

6. ORS 659.780(5) defines "political matters" to include "the decision to join, not join, support or not support any lawful political or constituent group," and ORS 659.780(1) defines

"constituent group" to include a labor organization.

7. ORS 659.785(2) provides that a successful claimant may be awarded reinstatement, backpay, and reestablishment of employee benefits, including seniority. ORS 659.785(2) also provides that the claimant shall be awarded treble damages, attorney's fees, and costs. These provisions apply to private employees and employers also subject to the NLRA.

8. The preemption doctrine articulated by the United States Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), prohibits states from regulating any "activity that the [Act] protects, prohibits or arguably protects or prohibits," *Wisconsin Dept. of Industry and Gould, Inc.*, 475 U.S. 282, 286 (1986), *i.e.*, activity that is subject to the regulatory jurisdiction of the NLRB.

9. Congress has entrusted the NLRB with exclusive control over union election proceedings and the determination of the steps required for a fairly-conducted election proceeding. *NLRB v. Waterman S.S. Corp.*, 309 U.S. 206, 226 (1940).

10. Compulsory attendance at meetings held by employers to discuss their views about unions has long been permitted by the NLRB, provided the meeting is not held within 24 hours before a union election. *Peerless Plywood Co.*, 107 NLRB 427, 429-30 (1953).

11. The Oregon statute is thus preempted by *Garmon*, because it conflicts with the NLRB's regulation of employer conduct during a union election campaign and the NLRB's ability to regulate unfair labor practices, with respect to employers under the jurisdiction of the NLRA.

12. The preemption doctrine articulated by the Supreme Court in *Lodge 76, Int'l Ass'n of Machinists v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976), prohibits states from regulating conduct that "Congress intended… 'to be controlled by' the free play of economic forces.'" *Id.* at 140.

13. Section 8(c) of the NLRA, enacted in 1947, provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

14. Congress's enactment of Section 8(c) of the NLRA reflects its decision to leave non-coercive employer speech about unions unregulated by any governmental entity.

15. The Oregon statute is thus also preempted by *Machinists*, because it purports to regulate non-coercive employer speech about unions, with respect to employers under the jurisdiction of the NLRA.

16. Separately, the Oregon statute is preempted by direct operation of the Supremacy Clause of the United States Constitution (Article VI, Clause 2) because the statute forbids conduct both permitted and protected by the NLRA. Moreover, the statute frustrates the purpose of the NLRA and stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

17. On June 14, 2019, the International Brotherhood of Teamsters Local 206 ("Local 206") filed a Representation Petition with the NLRB's Region 19 seeking to represent a unit of the employer's workforce in Portland, Oregon. *DS Services of America, Inc. and IBT, Local 206,* Case No. 19-RC-243327. [Exhibit 2]. The employer filed a Motion for Stay of Election asserting that absent a stay, it must comply with the Oregon statute and refrain from making captive audience speeches during the election campaign. The employer asserted, among other things, that the state law is preempted by the NLRA. [Exhibit 3].

18. On July 26, 2019, the NLRB issued an Order denying the employer's request to stay the election proceedings. The NLRB's Order noted it did not preclude the employer from raising issues related to the impact of the Oregon statute in any post-election proceedings. [Exhibit

4].

19. The election conducted in Case No. 19-RC-243327 resulted in Local 206 not being selected as the unit employees' bargaining representative. [Exhibit 5].

20. Nevertheless, there have been other petitions filed with NLRB's Region 19, seeking to determine who represents employees of private employers in Oregon covered by the NLRA. (NLRB Case Nos. 19-RC-252363, 19-RC-253012, 19-RC- 254203, 19-RC-255017, 19-RC-231425 and 19-RM-242193). In those cases, as in any future election proceedings filed in Oregon, the employers may be forced to choose between exercising their rights under the NLRA to hold captive audience speeches with their employees, or complying with the Oregon statute.

21. By letter dated November 1, 2019, the NLRB's General Counsel notified the Attorney General of the State of Oregon of the Agency's concern that the Oregon statute is preempted by the NLRA, and expressly sought the state Attorney General's assistance in determining whether the Agency's preemption concern could be addressed by the Government of the State of Oregon. By letter dated December 10, 2019, Oregon's Deputy Attorney General expressed his disagreement with the NLRB's finding, and notified the NLRB that his office will take all steps to defend the Oregon statute.

WHEREFORE, the NLRB respectfully requests that this Court:

1. Issue a declaration that Oregon Revised Statutes 659.780 and 659.785 are invalid as to employers subject to the NLRA, because these provisions are preempted:

a. by the NLRA as the provisions:

i. conflict with the NLRB's regulation of employer conduct during a union election campaign and the NLRB's ability to regulate unfair labor practices, and

ii. purport to regulate non-coercive employer speech about unions that no entity is permitted to regulate, and

b. by direct operation of the Supremacy Clause of the United States Constitution (Article VI, Clause 2), because the Oregon statute forbids conduct protected and permitted by the NLRA.

2. Assess costs against the State of Oregon and grant such other and further relief as the Court may deem proper.

DATED: February 7, 2020

Respectfully submitted,

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